

its lines to peddle their wares.

"A BBS operator should not be held responsible for the content of that BBS. A BBS operator should not be required to know everything that's on their BBS," Howard Rheingold, editor of the *Whole Earth Review*, said at last weekend's Boston Computer Society conference on Computers and Social Responsibility, at UMass/Boston. Rheingold, who spoke from San Francisco by two-way video, is the author of *The Virtual Community*, a book on the emerging on-line culture.

But according to the government's indictment, LaMacchia did far more than act as a common carrier: although he's not accused of stealing the software himself, investigators say he created a way for Internet users worldwide to upload and download pirated goods without revealing their identities, and he publicized the availability of the software — which included such goodies as new versions of WordPerfect.

"Both the scale of the crime and his intent to illegally distribute the software take this far beyond the bounds of the First Amendment," US Attorney Donald Stern said in announcing the indictment. If convicted, LaMacchia could face a prison sentence and be fined up to \$250,000.

In a written statement, though, LaMacchia's lawyers, Harvey Silverglate and David Duncan, deny their client took action to make it easier for people to obtain the cloned programs. Indeed, they intend to rely on a common-carrier defense. "It is not at all clear that a sysop who neither controls what is placed on the system nor profits one cent from any copyrighted software that others upload to and download from the system . . . has committed any crime," they wrote. "In short, this case raises the hotly disputed question of whether the operator of a 'common carrier' may be held criminally responsible for the manner in which others use his communications system."

Mitch Kapor, in an interview with the *Phoenix*, cautioned that he's not familiar with the particulars of the LaMacchia case, but said the issues appear to fall into a gray

area that will only be resolved over time.

"The nature of the medium itself is sufficiently different from, say, print media that you get, in effect, new problems for which there is no direct analogue," he says. For instance, he notes, though it may be illegal for someone to make photocopies of a best-selling novel and give it to his or her friends, in practice very few people do that anyway. "But it's so easy to propagate information around networks," Kapor adds, "that you get kinds of problems that simply didn't exist before."

(By the way: Silverglate, one of LaMacchia's lawyers, is also counsel to the EFF, and a *Phoenix* contributor as well. Kapor says the EFF had nothing to do with Silverglate's taking the case.)

Although Kapor doesn't condone the behavior of which LaMacchia is accused — after all, Kapor became wealthy selling Lotus 1-2-3 to paying customers — neither does he believe anything would be served by shipping him off to the federal pen.

"I would hope in this case," Kapor says, "that the consensus we arrive at is that what LaMacchia is *alleged* to have done is improper, but I hope that it won't be the kind of thing that gets a jail sentence. Because that seems to me to be overly punitive." □

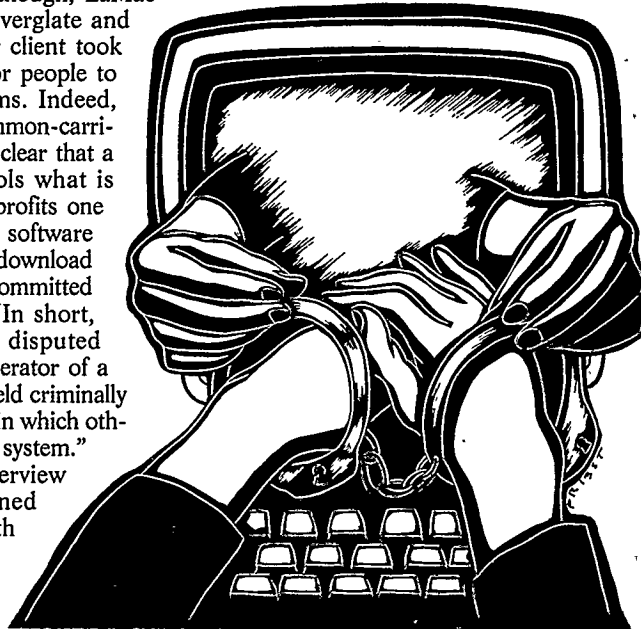


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MIT software-piracy case won't settle any arguments

by Dan Kennedy

Although the merits of the government's case against an MIT student accused of distributing illegally copied software on his electronic bulletin-board system are being hotly disputed, this much is clear: it makes for a lousy test case.

A federal grand jury indicted David LaMacchia, a 20-year-old student from Rockville, Maryland, and charged him with using MIT's computers to commit wire fraud by distributing more than \$1 million worth of pirated software over the Internet.

Experts say the specifics of the April 7 indictment — that LaMacchia actively assisted in distributing illegally copied software (a charge his lawyers vigorously deny) — make it unlikely the case will resolve complicated issues involving the responsibilities of those who operate bulletin-board systems, known as BBSs. Instead, it

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is more likely to make a small contribution in clarifying how copyright violations ought to be punished in the digital age — especially when, as in LaMacchia's case, there is no profit motive alleged.

"After some time and the accumulation of enough of these cases," says Mitch Kapor, chairman of the Electronic Frontier Foundation (EFF), "if the legal system is working well, the law will evolve incrementally — either through interpretation of existing statutes or the passage of new statutes — and we'll arrive at some new consensus."

So what would make a good test case? One in which the so-called common-carrier concept is clearly at issue. Groups such as the EFF and Computer Professionals for Social Responsibility are pushing the government to adopt laws similar to those regulating telephone companies, which must act as common carriers: they must take all customers and cannot monitor or censor the content of that traffic.

Thus, these activists argue that the system operator, or sysop, of a BBS should be no more liable for arrest for the contents of that board than the chief executive officer of Nynex would be if it were discovered that, say, child pornographers were using

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